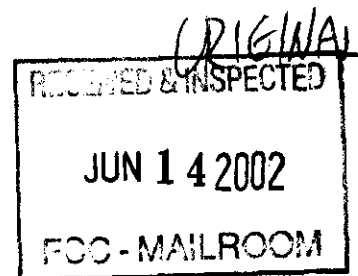


Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554



In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. 00-148  
Table of Allotments ) RM-9939  
FM Broadcast Stations ) RM-10198  
(Quannah, Archer City, Converse, Flatonia, )  
Georgetown, Ingram, Keller, Knox City, )  
Lakeway, Lago Vista, Llano, McQueeney, )  
Nolanville, San Antonio, Seymour, Waco and )  
Wellington, Texas, and Ardmore, Durant, )  
Elk City, Healdton, Lawton and Purcell, )  
Oklahoma.) )

To: Assistant Chief  
Audio Division  
Media Bureau

OPPOSITION TO MOTION TO STRIKE

1. This relates to the motion (referred to as the "subject Motion") of First Broadcasting Company, L.P., Next Media Licensing, Inc., Rawhide Radio, L.L.C., Capstar TX Limited Partnership and Clear Channel Broadcasting Licenses, Inc. (referred to as the "Joint Parties") to strike comments dated May 14, 2002 (referred to as the "subject Comments") of Elgin FM Limited Partnership and Charles Crawford (referred to as "Elgin-Crawford") regarding the Joint Parties' response to the Commission's request for supplemental information in the captioned proceeding. The subject Motion is without merit and should be denied.

2. After the initial round of comments and reply comments had been completed, the Commission requested that the Joint Parties furnish a copy of an agreement and other documentation specified in its rules for the Joint Parties to compensate the owner of station KICM, Krum, Texas, to downgrade its allotment in

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order to facilitate the massive channel realignment sought by the Joint Parties. That matter relates to issues that various interested parties including Elgin-Crawford have briefed in their comments and reply comments.

3. In requesting the Joint Parties to supply the agreement and related documentation, the Commission permitted the filing of comments by other parties, which were to be served on counsel for the Joint Parties. On the date set for the Joint Parties to file the agreement and related documentation, these documents were not filed. Rather, the Joint Parties commenced the tender of motions for extension of time to do so, none of which was granted or otherwise acted on by the Commission.

4. Approximately two months after the date specified, on April 26, 2002, the Joint Parties filed a pleading ostensibly in response to the Commission's request. However, the Joint Parties declined to file the agreement and related documentation. Instead, they tendered factual allegations and legal arguments seeking to justify their refusal to comply with the Commission's request. On May 14, 2002, Elgin-Crawford filed the subject Comments addressed to these developments, i.e., failure to file the agreement and related documents and the facts and law argued by the Joint Parties for not honoring the agency's request.

5. The Joint Parties (a) having foisted on the Commission an allocations scheme which offends rational thought (to add new FM allotments to three major radio markets on the pretext of providing local service to relatively miniscule communities

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imbedded in those markets), (b) having dangled an apparent million dollars or so in front of the owner of the Krum station to aid and abet their allocations scheme, and (c) having told the Commission to get lost in its effort to obtain documents needed in order to administer the nation's frequency allocations structure in the public interest as required by law, the Joint Parties (d) now ask the Commission to preclude Elgin-Crawford from even being heard with regard to their contumacious conduct.

6. The subject Motion cites Section 1.415(d) of the Commission's regulations and the ruling of the agency's staff in Winslow, Arizona, et al., 15 FCC Rcd 9155, n. 3 (Media Bureau, then Mass Media Bureau, 2000) as supporting such an arrogant position and calling for such an astonishing result. Well, not quite.

7. The Commission's request for the production of the apparent million-dollar-plus Krum agreement and related documents invited other parties to file comments as well. While in one portion of the Commission's request, a single date was set for all to file comments (§4), in a subsequent portion of the request dealing with ex parte matters there was also reference to the filing of reply comments (§6). Moreover, given the fact that parties such as Elgin-Crawford would not be in a position to file meaningful comments without first seeing the Krum agreement and related documents that had been requested, the Commission's request was not totally clear regarding the procedural posture of other parties wishing to file meaningful comments on the matter.

In any event, nothing was filed by the Joint Parties or any other party on the prescribed date (February 28, 2002), the Joint Parties having lodged a motion for extension of time (February 22, 2002), which still remains pending before the agency.

8. The Joint Parties, thus, picked a time and date of their own choosing (April 26, 2002) -- without advance notice to the other parties such as Elgin-Crawford or, for all we know, to the agency itself -- to surface with the unilateral filing of a response to the Commission's request. The Joint Parties were joined on the same date only by the owner of the Krum station, whose loyalties to the scheme had been solidified by the apparent million-dollar-plus agreement and related documents still shielded from public inspection lodged in their respective private files.<sup>1</sup>

9. Under these hostile and intransigent facts and circumstances, other interested parties such as Elgin-Crawford had no opportunity to file their comments simultaneously with the Joint Parties -- lacking clairvoyance to know when the Joint Parties acting in concert with their Krum co-conspirator were

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<sup>1</sup> It is appropriate for the Commission to invoke the principle of evidentiary law that if a party has relevant documents that are peculiarly within its private possession and not otherwise available to an opposing party or the tribunal, and if the party in possession of such documents chooses to "eloidne" them, i.e., withhold them from disclosure, the tribunal may draw the inference that this relevant evidence, if produced, would be unfavorable to the party withholding it. E.g., Interstate Circuit, Inc. v. U.S., 306 U.S. 208 (1938); Mid-Continent Petroleum Corporation v. Keen, 157 F.2d 310, 315 (8th Cir. 1946); Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev.Bd. 1988); Black's Law Dictionary, Fourth Edition (1951) at 613.

going to file -- and lacking the prescience to know what the Joint Parties and the Krum party were going to say, i.e., refusing to comply with the Commission's request, making factual allegations and legal arguments that are new to the record in the proceeding.

10. In this milieu, the filing of the subject Comments by Elgin-Crawford (dated May 14, 2002) within a reasonable time after receipt of the Joint Parties' filing (dated April 26, 2002) is substantially in accord with Section 1.415(d) of the Commission's rules. The subject Comments should be construed as comments what were "authorized" by the agency within the meaning of the rule. Clearly the Commission intended that interested parties such as Elgin-Crawford were entitled to file comments with regard to the Krum agreement, provided that they served copies on counsel for the Joint Parties, which Elgin-Crawford did. While the timing of such comments was not perfectly designed in the Commission's request, ensuing extension motions by the Joint Parties and the absence of action thereon by the agency rendered the date of the Joint Parties' filing uncertain and unknown -- both to the Commission and to the other parties. Having been placed in this posture through no fault of its own, Elgin-Crawford proceeded as best and expeditiously as it could.<sup>2</sup>

11. Winslow, Arizona, et al. does not remotely support the effort to preclude the Commission from considering the subject

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<sup>2</sup> Out of an abundance of caution, a motion for leave to file the subject Comments is being filed along with this pleading, setting forth good cause for acceptance by the Commission.

Comments filed by Elgin-Crawford. In that case, after the record in an allotment rulemaking proceeding had been closed, an entity that had not previously been a party to the proceeding tried to file untimely comments without any extenuating circumstances. In rejecting that effort, the Commission stated that the untimely pleading

...is not entitled to consideration as no new developments or changed circumstances were presented to justify the late pleading, nor does it present any decisionally significant issue to warrant acceptance of its comments.

15 FCC Rcd at 9155, n. 3.

12. In contrast, here (a) Elgin-Crawford participated as parties in interest throughout all phases of this proceeding; (b) Elgin-Crawford filed the subject Comments pursuant to the invitation of the Commission albeit under uncertain circumstances as to the time for doing so; (c) Elgin-Crawford acted expeditiously upon learning of the new developments and changed circumstances consisting of the refusal of the Joint Parties to comply with the agency's request and, instead, the Joint Parties' tender of new factual allegations and new legal arguments; and (d) the subject Comments address decisionally significant matters raised by and in the Joint Parties' filing and conduct.

13. The Joint Parties make no reference to examples of acceptance of pleadings filed after the authorized round of pleadings. See, e.g., Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina, 15 FCC Rcd 10739, n. 2 (Media Bureau, then Mass Media Bureau, 2000) in which consideration of supplemental pleadings relative to a petition for reconsideration by parties

who participated in the allotment rulemaking proceeding or were affected by the petition for reconsideration were accepted "in order to review this proceeding on a more complete record".

Also, Wallace, Idaho and Lolo, Montana, 14 FCC Rcd 21110, n. 1 (Media Bureau, then Mass Media Bureau, 1999) in which comments filed three months late opposing a proposal to change community of license and downgrade a facility were considered "in the interest of promoting the resolution of this case on the basis of an enhanced record". The late-filed pleading thus accepted eventually was instrumental in rejection of the downgrade and licensed community change on public interest grounds.

14. Also not mentioned by the Joint Parties in this context is precedent for the exercise of the Commission's discretion to consider a supplemental pleading as an informal comment under Section 1.419(b) of the rules. E.g., Revision of Filing Requirements, 11 FCC Rcd 16326, n. 7 (Commission 1996) in which late-filed reply comments by a common carrier entity having an interest in a rulemaking proceeding dealing with reporting requirements applicable to common carriers were considered by the Commission under Section 1.419(b).

15. For these reasons, the subject Motion should be denied and the full record -- including the subject Comments -- with regard to the failure of the Joint Parties to comply with the Commission's request for the production of the Krum agreement and related documents should be considered in arriving at the public

interest judgments in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Gene A. Bechtel', written over a horizontal line.

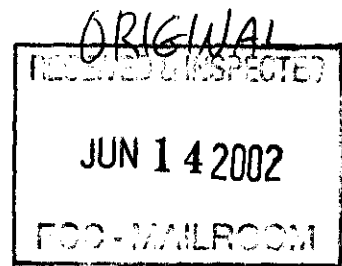
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Counsel for Elgin FM Limited  
Partnership and Charles Crawford

June 12, 2002





CERTIFICATE OF SERVICE

I certify that copies of the OPPOSITION TO MOTION TO STRIKE and the MOTION FOR LEAVE TO FILE COMMENTS filed this date on behalf of Elgin FM Limited Partnership and Charles Crawford are - also on this date - being delivered to the office of the Secretary for delivery to Messrs. Stewart and Ratcliffe and being placed in the United States mails, postage prepaid, first class, addressed to the offices of the other parties as shown on the attached "Quanah, Texas, Service List."



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Gene A. Bechtel

June 12, 2002

Quanah, Texas, Service List

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